Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1993

DOUGLAS NYHUIS

Petitioner,

-vs-

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Douglas NYHUIS, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Anicia Marivel RIPOLL, a/k/a Anicia Goodman, Defendant-Appellant.

Nos. 91-3628, 91-3629

United States Court of Appeals,
Eleventh Circuit.

Dec. 2, 1993.

Defendant was convicted in the United States District Court for the Middle District of Florida, No. 90-139-CR-ORL-19, Patricia C. Fawsett, J., of conspiracy to possess with intent to distribute and to distribute more than five kilograms of cocaine. Another defendant was convicted in the District Court, No. 91-4-CR-ORL-19, of aiding and abetting importation of 1,500 kilograms of cocaine. Defendants appealed.

The Court of Appeals, Carnes, Circuit Judge, held that: (1) Michigan conviction for involvement in continuing criminal enterprise did not bar conspiracy prosecution; (2) double jeopardy clause does not bar prosecution and punishment for criminal conduct that was used for sentence enhancement in earlier prosecution; and (3) person convicted as aider and abettor can be sentenced as organizer or leader.

Affirmed.

B. Robert Ohle, St. Petersburg, FL, and Stephen J. Bronis, Miami, FL, for defendants-appellants.

Robert W. Genzman, Rick Jancha, U.S. Attys., Orlando, FL, Karla Spaulding, and David P. Rhodes, Asst. U.S. Attys., Tampa, FL, for plaintiff-appellee.

Appeals from the United States District Court for the Middle District of Florida.

Before EDMONDSON and CARNES, Circuit Judges, and HILL, Senior Circuit Judge.

CARNES, Circuit Judge:

After a joint trial, Douglas Nyhuis and Anicia Goodman appeal their convictions and sentences which resulted from their involvement in a cocaine importation and distribution conspiracy operating inside and outside the United States. Nyhuis was convicted on one count of conspiracy to possess with intent to distribute and to distribute greater than five kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Goodman was convicted on one count of aiding and abetting the importation of 1500 kilograms of cocaine in violation of 21 U.S.C. §§ 963 and 960(b)(1)(B).

Between them, Nyhuis and Goodman raise seven issues, four of which warrant no discussion. The three issues that do warrant discussion are: 1) Nyhuis's contention that the district court erred in denying his motion to dismiss the

indictment returned in the Middle District of Florida on grounds that he was being prosecuted and punished a second time for the same offense in violation of the Double Jeopardy Clause, the first time having been a conviction and sentence in the Western District of Michigan for operating a continuing criminal enterprise; 2) Nyhuis's contention that the district court erred in denying his motion to dismiss the Florida indictment on the grounds that the prosecution violated the terms of immunity he had been granted after his Michigan plea agreement; and 3) Goodman's contention that the district court erroneously considered her extraneous criminal conduct in concluding that her role in this crime was that of an "organizer or leader" under U.S.S.G. §3B1.1(a).[1] We will discuss these

[1] The four contentions we reject without further discussion are Goodman's arguments that the district court: 1) abused its discretion in refusing to grant

three contentions in the order stated, and conclude that the convictions and sentences of Nyhuis and Goodman are due to be affirmed.

I. NYHUIS'S DOUBLE JEOPARDY CLAIMS

Under a Michigan indictment, Nyhuis was convicted of being a member of a continuing criminal enterprise (CCE) involving the distribution of marijuana. Under the Florida indictment in this case, he was convicted of conspiracy to distribute

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her a four hour continuance to allow retained counsel to be present for trial; 2) erred in granting the Government's Fed.R.Crim.P. 13 motion jointly to try her indictment with an indictment charging other defendants with a drug importation conspiracy; 3) abused its discretion in admitting collateral acts evidence concerning Goodman and her husband as "inextricably intertwined," or as "other crimes" evidence, or both, in violation of Fed.R.Evid. 403 and 404(b); and 4) erred in denying her motion for judgment of acquittal because the Government failed to present sufficient evidence at trial to support the jury's verdict. Nyhuis raises only two contentions, both of which we discuss in the text above.

cocaine. Nyhuis contends that the Michigan and Florida activities were simply two parts of the same conspiracy that existed throughout the entire period of 1983 to 1989, and that he has been convicted twice for his involvement in this single conspiracy. To support this contention, Nyhuis argues that the source of the marijuana and the cocaine was the same throughout the conspiracy and that many of the parties involved in the marijuana CCE were also involved in the conspiracy to distribute cocaine. According to Nyhuis, the Government's use of evidence of his marijuana distribution activities in its Florida cocaine case lends further support for his contention. Nyhuis also argues that because conspiracy is a lesser included offense of CCE, the Florida cocaine conspiracy charge merges into the Michigan marijuana CCE conviction so that separate convictions for the two are barred

by the Double Jeopardy Clause. Nyhuis also raises a multiple punishment challenge, contending that because the district court in Michigan considered Nyhuis's involvement in the cocaine conspiracy when it fashioned his sentence for the marijuana CCE conviction, he has been punished twice for this conduct.

A. THE FACTS

1. Nyhuis's Michigan Prosecution For Marijuana Activities

From 1983 to 1989, Nyhuis was involved in marijuana distribution in the Western District of Michigan. In the Michigan operation, Nyhuis was essentially a wholesaler who received shipments of marijuana from Florida and then allocated the goods to his retail distributors. Sometime in 1984, Nyhuis began obtaining his marijuana supply from Florida drug kingpin George Marian through a mutual friend, James Muth. After the Marian

marijuana supply line dried up in 1985, Muth continued to supply Nyhuis through the use of sources other than the Marian organization.

Two counts of a twenty-six count indictment returned in the Western District of Michigan in December of 1989 charged Nyhuis with: conspiracy to distribute and possess with intent to distribute marijuana (count one); and operation of a continuing criminal enterprise ("CCE") involving marijuana between January 1985 and October 1987 (count twenty-six). Various counts of the indictment also charged nineteen others, including James Muth; however, George Marian was not named in the indictment. The object of the conspiracy was "to make money from the unlawful distribution and sale of marihuana," with the alleged overt acts occurring principally in Michigan and Florida.

Pursuant to a plea agreement executed on

December 13, 1989, Nyhuis pleaded guilty to the CCE count, and the conspiracy count against him was dismissed. Under the terms of the agreement, the Government committed to making a recommendation of a ten-year sentence for Nyhuis. The plea agreement also contained the following clause:

> The government agrees not to bring additional criminal charges against the defendant in the Western District of Michigan arising out of his involvement in the distribution of marijuana and those transactions disclosed by the defendant in the proffer already made to the government.

The day after the agreement was executed, Nyhuis testified before a Michigan grand jury. Unfortunately for Nyhuis, he elected to conceal from the Government and the grand jury both his involvement in the cocaine trade and his relationship with George Marian. The Government independently developed evidence that indicated that Nyhuis had been less than candid with the Government and in his

grand jury testimony. As a consequence, Nyhuis's plea agreement was renegotiated upward to include a fifteen-year sentence recommendation. The Government did not seek a superseding indictment to incorporate Nyhuis's cocaine activities, and the Michigan district court granted a defense motion *in limine* prohibiting Nyhuis from being asked about his cocaine activities in his testimony at the trial of his codefendants in Michigan. After being fully informed of Nyhuis's criminal activities--both marijuana and cocaine--the district court in Michigan in July of 1990 sentenced Nyhuis to fourteen years in prison. Two days after his sentencing, Nyhuis against testified before a Michigan grand jury and this time he gave a full account of his marijuana and cocaine dealings with George Marian and others.

2. Nyhuis's Florida Prosecution For Cocaine Activities

In December of 1990, in the Middle District of Florida, an indictment was returned against twenty-three defendants, including Nyhuis and drug kingpin George Marian, for conduct relating to the importation and distribution of cocaine that had occurred from March 1985 through October 1989. Marian himself was charged with operating a CCE for the importation and distribution of cocaine. Nyhuis, named in only one count of the twenty-one count indictment, was charged with conspiring with George Marian and others to possess with intent to distribute and to distribute in excess of 5 kilograms of cocaine hydrochloride. The objects of the conspiracy included possession with intent to distribute and distribution of large quantities of cocaine outside the United States and inside, including within "Florida, Michigan, California, Washington, and elsewhere." The overt acts section of

that count specifically charged that in March of 1989 Nyhuis sent a courier from Michigan to pick up cocaine from George Marian in Florida and deliver it to Nyhuis in Michigan. It also charged that in July or August of 1989, Nyhuis facilitated a transaction involving the purchase of cocaine from George Marian in Florida and its transportation to Michigan.

The three key witnesses who testified against Nyhuis at the Florida trial were George Marian and Nyhuis's two cocaine couriers. Marian testified that Nyhuis contacted him in March of 1989 to reestablish their drug trafficking relationship. Marian also stated that he agreed to obtain for Nyhuis "small amount[s]" of cocaine in one kilogram installments. In addition, two couriers employed by Nyhuis also testified regarding Nyhuis's conduct in connection with the two overt acts in which Nyhuis was named.

Nyhuis was convicted of conspiracy to possess with intent to distribute and conspiracy to distribute cocaine.

B. DOUBLE JEOPARDY ANALYSIS AFTER *DIXON*

"The Double Jeopardy Clause affords the defendant three basic protections. The Clause protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." *United States v Cochran*, 883 F.2d 1012, 1016 (11th Cir.1989). "A denial of a motion to dismiss based on double jeopardy grounds is ... a question of law, [and] a district court's double jeopardy ruling is subject to *de novo* review by the appellate court." *United States v Benefield*, 874 F.2d 1503, 1505 (11th Cir.1989). We have also observed that "[w]hen a defendant moves to dismiss an

indictment on double jeopardy grounds, it is undisputed that he bears the burden of making a prima facie nonfrivolous claim." *Id.*. Once this threshold is crossed, "the government must prove by a preponderance of the evidence that the two indictments charge separate crimes." *Id.*. Where the defendant is charged with multiple conspiracies, "the determination as to whether the government can prosecute a defendant for more than one conspiracy turns on whether there exists more than one unlawful agreement." *Id.*

This case was briefed and argued before the Supreme Court's decision in *United States v Dixon*, ___ U.S. ___, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). In *Dixon*, the Court reaffirmed the "same-element test" drawn from its decision in *Blockburger v United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932): "In both the multiple punishment

and multiple prosecution contexts, this Court has concluded that where the two offenses for which the defendant is punished or tried cannot survive the 'same-elements' test, the double jeopardy bar applies." *Dixon*, ___ U.S. at ___, 113 S.Ct. at 2856, 125 L.Ed.2d at 568. Because it concluded "that at least some of the counts at issue [in *Dixon* were] not barred by the *Blockburger* test," *id.* at ___, 113 S.Ct. at 2859, 125 L.Ed.2d at 572, the Court went on to consider whether those counts were barred by the "new, additional double jeopardy test" announced in *Grady v Corbin*, 495 U.S. 508, 510, 110 S.Ct. 2084, 2093, 109 L.Ed.2d 548, 557 (1990). *Id.* In attempting to apply *Grady*, the Court "encountered ... yet another situation in which the pre-*Grady* understanding of the Double Jeopardy Clause allows a second trial, though the 'same-conduct' test would not...." *Id.* at ___, 113 S.Ct. at 2864,

125 L.Ed.2d at 577. "[B]ecause *Grady* contradicted an 'unbroken line of decisions,' contained 'less than accurate' historical analysis, and has produced 'confusion,'" the Court admitted that *Grady* "was a mistake," and accepted the Government's invitation to overrule it. *Id.* at ___, 113 S.Ct. at 2864, 125 L.Ed.2d at 577-78.

When the present case was argued, we could only state that our double jeopardy inquiry must begin with *Blockburger*'s "same-elements test." Because *Dixon* eliminated the *Grady* "same-conduct" test, the *Blockburger* test will normally be the only inquiry required when a court is confronted with a double jeopardy attack. As the Supreme Court reiterated in *Dixon*, *Blockburger* "inquires whether each offense contains an element not contained in the other...." *Dixon*, ___ U.S. at ___, 113 S.Ct. at 2856, 125 L.Ed.2d at 568.

C. NYHUIS'S MULTIPLE PROSECUTION CLAIM

1. Double Jeopardy Analysis In The Context of Consecutive CCE And Conspiracy Charges

[1] Applying *Blockburger*, we normally would compare the elements of the CCE offense to which Nyhuis pled guilty in Michigan with the 21 U.S.C. § 846 conspiracy charge on which Nyhuis was convicted in Florida.[2] However, the

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[2] We may disregard the § 846 conspiracy charge in the Michigan indictment which was dismissed pursuant to Nyhuis's plea agreement because jeopardy did not attach to that dismissed charge. *Cf. United States v Baggett*, 901 F.2d 1546, 1550 (11th Cir.) (holding that "the double jeopardy clause [does not] bar[] prosecution for counts dismissed as a result of a subsequently withdrawn plea bargain"), *cert. denied*, 498 U.S. 862, 111 S.Ct. 168, 112 L.Ed.2d 133 (1990); *see also United States v. Soto-Alvarez*, 958 F.2d 473, 482 n. 7 (1st Cir.) ("[J]eopardy ordinarily does not attach to counts which are dismissed and on which no finding of guilty is made."), *cert. denied*, ___ U.S. ___, 113 S.Ct. 221, 121 L.Ed.2d 159 (1992).

interplay between the CCE statute[3] and the various conspiracy statutes requires a different approach. This is so because, as the former Fifth Circuit has held:

> A double jeopardy defense will lie where the government has previously prosecuted a defendant under either § 846 [conspiracy] or § 848 [CCE] and then seeks to prosecute him again on the basis of the same criminal agreement under the other statute. "Whatever the sequence may be, he Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."

United States v Stricklin, 591 F.2d 1112,

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[3] Continuing Criminal Enterprise is defined as follows:

For the purpose of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if--

(1) he violates any provision of this subchapter [21 U.S.C. §§ 951-971] the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter-- (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(c).

1123 (5th Cir.) (quoting *Brown v Ohio*, 432 U.S. 161, 169, 97 S.Ct. 2221, 2227, 53 L.Ed.2d 187 (1977), *cert. denied*, 444 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 375 (1979); *see also United States v Graziano*, 710 F.2d 691, 699 (11th Cir.1983) (A "§ 846 offense of conspiracy is a lesser-included offense of the § 848 offense of engaging in a continuing criminal enterprise."), *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984). However, as the *Stricklin* court made clear:

> The attachment of jeopardy to one conspiracy prosecution under § 846 does not insulate a defendant from prosecution for conducting a continuing criminal enterprise in violation of § 848 if the government has evidence of a *separate conspiracy* with which to satisfy the "in concert" element of § 848.

Stricklin, 591 F.2d at 1124 (emphasis added).

Stricklin requires that we first examine the record to determine if Nyhuis has made a prima facie showing that the events

charged in the Michigan indictment and those charged in the Florida indictment were part of a single conspiracy. *Id.* at 1122; *see also United States v Benefield*, 874 F.2d 1503, 1505 (11th Cir.1989). As we noted in *Benefield*, the former Fifth Circuit "underscored the difficulty in identifying the parameters of section 846 conspiracies" in its decision in *United States v Marable*, 578 F.2d 151, 154 (5th Cir.1978). *Benefield*, 874 F.2d at 1506. "[B]ecause a section 846 indictment may be tightly drawn, the court must look to the record to determine whether constituent elements of the two conspiracies charged indicate that the government has twice placed the defendant in jeopardy." *Marable*, 578 F.2d at 154; *see also Benefield*, 874 F.2d at 1506. To facilitate this inquiry, the *Marable* court announced a set of factors to guide the examination of the record:

> (1) time, (2) persons acting as co-conspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case, and (5) places where the events alleged as part of the conspiracy took place.

Marable, 578 F.2d at 154; *see also Benefield*, 874 F.2d at 1506. Other circuits have applied these same "*Marable* factors." *See, e.g., United States v Gomez-Pabon*, 911 F.2d 847, 860-61 (1st Cir.1990), *cert. denied*, 498 U.S. 1074, 111 S.Ct. 801, 112 L.Ed.2d 862 (1991); *United States v Tanner*, 860 F.2d 864, 866-67 (8th Cir.1988), *cert. denied*, 498 U.S. 844, 111 S.Ct. 125, 112 L.Ed.2d 93 (1990). Although the Government suggests that "[a]nother factor often used is whether the two conspiracies depend on each other for success," that factor has not been adopted in this Circuit.

2. Application Of The *Marable* Factors

a. Time

[2] The Michigan indictment alleged a time frame running from December of 1983 through October of 1987. In this Florida case, the time frame ran from "at least" March of 1985 through October of 1989. According to the Florida indictment, Nyhuis's involvement in the cocaine enterprise occurred in 1989. The mere fact that there is some overlap in the time frames alleged does not mean that the two indictments involve the same conspiracy. *United States v Tanner*, 860 F.2d 864, 866 (8th Cir.1988), *cert. denied*, 498 U.S. 844, 111 S.Ct. 125, 112 L.Ed.2d 93 (1990). On the other hand, "[t]he commission of crimes at different times does not necessarily prove that the crimes were carried out pursuant to more than one agreement." *Benefield*, 874 F.2d at 1505.

Nyhuis testified in the trial of his

codefendants in Michigan that while he was involved in the purchase and sale of marijuana from at least 1983 he did not meet George Marian until 1985. Nyhuis also stated that during his early involvement in the marijuana trade, his supplier was Michigan codefendant John Campau. When Campau went to prison in 1984, Nyhuis continued to receive his supply from Campau's sources through James and Kathy Dabbous, also codefendants in Michigan. During this period, Nyhuis did not know the identities of these sources. Thus, Nyhuis's marijuana distribution activities commenced before he became directly involved with George Marian in 1985.

Nyhuis's marijuana activities also survived a change in the Marian organization that took that organization out of the marijuana distribution business in mid-1985. During the trial of this case, Michael Shanley, an associate of

George Marian, testified that before mid-1985, Marian was engaged in the marijuana distribution business, but at that time, Marian "moved on to a different aspect of the drug business, which was drug smuggling importation." Shanley also noted that with the shift in focus of the Marian organization came a change in product from marijuana to cocaine. According to Shanley, there was a "clear-break" between the earlier marijuana distribution business and the later cocaine importation enterprise. Testimony of one of Nyhuis's Michigan codefendants, James Muth, indicated that after the Marian supply line dried up in 1985, Nyhuis looked to Muth as his source of supply for marijuana. Marian himself testified that he "kind of lost contact with Doug [Nyhuis] a couple of years there." Marian added that it was not until 1989 that he and Nyhuis met, at the initiative of Nyhuis, to discuss the

possibility of his supplying Nyhuis with small amounts of cocaine. Thus, while there was some over-lap in the times alleged in the two indictments, Nyhuis's Michigan organization existed as an independent economic entity both before and after any involvement with George Marian and his Florida-based operation. Thus, this time factor weighs against Nyhuis.

b. Co-Conspirators

The second *Marable* factor is the extent to which there is an overlap of co-conspirators. This Court observed in *Benefield* that "the fact that a conspiracy must take on additional members to accomplish one of its objectives does not in itself establish a different conspiracy." 874 F.2d at 1507; *see also United States v Nichols*, 741 F.2d 767, 772 (5th Cir.1984) ("A mere shuffling of personnel in an otherwise on-going operation with an apparent continuity will

not, along, suffice to create multiple conspiracies."), *cert. denied*, 469 U.S. 1214, 105 S.Ct. 1186, 84 L.Ed.2d 333 (1985). The Government asserts, however, that this is not a case of continuous agreement with intermittent changes in personnel: "With the exception of the defendant [Nyhuis], the case of characters actually charged in Florida is wholly different from those [sic] indicted in Michigan." Nyhuis concedes that he was the only conspirator named in both indictments but counters that the Government's primary witnesses in this Florida case--Mark DeVries and James Muth--were both named in the Michigan indictment. In addition, George Marian and witness Michael Shanley were named as possible coconspirators in a bill of particulars issued in the Michigan case.

Based on our review of the record and the indictments at issue, Nyhuis' argument,

though not without some appeal, ignores far too much. First, there is the virtually absolute dissimilarity between the defendants charged in the Michigan and Florida cases. These people moved in different, albeit equally shady, worlds and what they had in common was a connection to George Marian. Even if we indulge the unsupported notion that Marian played a more prominent role in the Michigan conspiracy than merely being one of its suppliers, it would still be possible for us to find separate conspiracies because, as the Second Circuit has observed, "[s]eparate chains of conspiracy may emanate from the same leadership." *United States v Reiter*, 848 F.2d 336, 341 (2d Cir.1988). Second, Nyhuis' relationship to the coconspirators in Michigan was that of a leader and organizer, while his role in Florida was far more modest. If Nyhuis was truly a lieutenant in one massive Marian

enterprise, his responsibility in the Florida scheme wold have been greater than is averred in the Florida indictment and established at trial. Third, with a few notable exceptions (Marian, Muth, and DeVries), the Government could not have charged most of the Florida defendants in the Michigan case, nor could it have charged most of the Michigan defendants in the Florida case. This is not a case of "tak[ing] on additional members to accomplish one of [the conspiracy's] objectives," or of a "mere shuffling of personnel in an otherwise on-going operation." Instead, the casts of characters in the two conspiracies are almost entirely different. Thus, this factor weighs against Nyhuis also.

c. Statutory Offenses Charged

The third *Marable* factor is the statutory offenses charged in the two indictments. The Michigan indictment

alleged that Nyhuis operated a continuing criminal enterprise in violation of 21 U.S.C. § 848. In addition, both the Michigan indictment and the Florida indictment charged Nyhuis with the identical statutory offense--a violation of 21 U.S.C. § 846, conspiracy to distribute and possess with intent to distribute a controlled substance. Thus, this factor weighs in Nyhuis' favor.

d. Overt Acts Charged

The fourth *Marable* factor is the overt acts charged in the two indictments which indicate the nature and scope of the activity the Government sought to punish in each case. Nyhuis concedes that "[t]he overt acts charged in the Michigan Indictment deal with marijuana and the overt acts charged in the Florida Indictment deal with cocaine," but he argues that "the actual facts that the Government set out to establish at the

Florida trial included a great deal of evidence regarding Appellant's marijuana transactions." The Government acknowledges that in this Florida case it did offer evidence regarding Nyhuis's marijuana activities in Michigan, but contends this was entirely proper--under Fed.R.Evid. 404(b) and the "inextricably intertwined" doctrine--where the "sole purpose[s]" of the evidence was to establish Nyhuis's intent in the Florida case and to explain the background of the crime charged.

Comparison of the overt acts alleged in the two indictments shows that they are dissimilar. The typical overt act alleged in the Michigan indictment was the interstate transportation of marijuana from Florida to Michigan. In the Florida indictment, the typical act is the maritime importation of cocaine from points outside the United States. Thus, this factor weighs against Nyhuis.

e. Location

The Michigan indictment alleged marijuana activities in the Western District of Michigan and in Florida. The Florida indictment alleged criminal conduct in Florida, Michigan, California, Washington, and offshore. Nyhuis makes a great deal of this locale overlap. However, review of the Florida indictment reveals that the only Michigan-based conduct alleged was that of Nyhuis. Moreover, Nyhuis was not involved in any of the offshore importation activities that pre-dominate the Florida indictment. To the extent this factor weighs in favor of Nyhuis, the weight is not substantial.

3. Conclusion

After weighing the *Marable* factors, we conclude that Nyhuis has failed to carry his burden of making out a prima facie double jeopardy claim. The record reflects that there were two conspiracies operating

in diverse locations: an earlier marijuana distribution ring, based in Michigan, headed by Nyhuis, and supplied by various individuals including George Marian; and a second operation dealing primarily in the importation of cocaine, headed by Marian and based in Florida. The almost complete diversity between the conspirators involved and the difference in overt acts alleged weighs heavily against Nyhuis. The fact that Nyhuis was involved in both conspiracies does not mean the two conspiracies were merged for double jeopardy purposes. That the two conspiracies were fundamentally different was acknowledged by Nyhuis himself. In explaining why he had initially concealed his cocaine involvement from the Government after pleading guilty in Michigan, Nyhuis told DEA Agent Scott Herman that he regarded the cocaine smuggling as "a separate deal" from the marijuana

trafficking. Indeed it was. We hold, therefore, that the Double Jeopardy Clause was not a bar to this prosecution of Nyhuis in Florida.

D. NYHUIS'S MULTIPLE PUNISHMENT CLAIM

[3] Nyhuis also contends that he was deprived of his double jeopardy protection against multiple punishments because, after his Michigan marijuana case sentence was increased based on his Florida cocaine activities, he was convicted of and punished again for those same cocaine activities in the present case. The district court found this "a far more difficult issue," explaining that "[i]t appears from the record presently before this Court that Defendant Nyhuis'[s] Michigan Plea Agreement was renegotiated to include an additional five years of imprisonment for his cocaine trafficking." The district court, however, declined to

rule on this claim when it was raised before trial. Relying on the Tenth Circuit's opinion in *United States v Koonce*, 885 F.2d 720 (10th Cir.1989), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1695, 118 L.Ed.2d 406, *and cert. denied*, ___ U.S. ___, 112 S.Ct. 1705, 118 L.Ed.2d 413 (1992), the court held that the issue of multiple punishments was not ripe for review. We need not consider whether the district court's ripeness conclusion was correct at the time of the pretrial ruling. Because Nyhuis has since been tried, convicted, and sentenced on the Florida charges, his multiple punishment claim is now ripe for review.

The issue presented is whether a defendant may be prosecuted and punished for conduct that has already been used to enhance the defendant's sentence for a conviction in an earlier prosecution. While this Court has not addressed this

specific question, those courts of appeals that have are in agreement that the Double Jeopardy Clause presents no bar to this practice. In *United States v Mack*, 938 F.2d 678 (6th Cir.1991), the defendant had his sentence on a drug conspiracy conviction enhanced because he had initially failed to appear for sentencing. Thereafter, he was indicted for a knowing failure to appear for sentencing in violation of 18 U.S.C. § 3146. He moved to dismiss that indictment on double jeopardy grounds. The district court denied the motion, and the Sixth Circuit affirmed that denial. The Sixth Circuit explained its reasoning:

> The consideration of collateral conduct for purposes of sentence enhancement is not new. Section 1B1.3 of the Sentencing Guidelines simply memorializes a long standing practice of trial judges. Prior convictions of a defendant routinely are used to determine the quantity of sentence. If Appellant is correct, then any consideration is a second punishment and therefore

> violative of the Double Jeopardy Clause.
>
> An enhanced sentence because of a prior conviction is no more double jeopardy than is a consideration of other relevant conduct, including the likelihood of a subsequent conviction.

Mack, 938 F.2d at 681.

The Seventh Circuit reached the same conclusion as the Sixth Circuit under nearly identical facts in *United States v Troxell*, 887 F.2d 830 (7th Cir.1989). In that case the sentencing judge made it clear that he considered the defendant's failure to appear on the initial sentencing date as an aggravating circumstance in sentencing her on a conviction for the distribution of cocaine. The defendant was subsequently indicted for that failure to appear at her sentencing hearing, in violation of 18 U.S.C. § 3146. The district court denied her motion to dismiss the indictment on double jeopardy grounds, and the Seventh Circuit affirmed.

Stressing that it "is important that a court have full and complete knowledge of the defendant before the imposition of a sentence ... includ[ing] 'alleged criminal activity for which the defendant has not been prosecuted,'" *id.* at 835 (citation omitted), the Seventh Circuit found that "[m]ere mention of a bad act in sentencing for a crime does not amount to attachment of jeopardy for that act." *Id.* at 836. The court held that the defendant "properly was punished for distributing cocaine in violation of 21 U.S.C. § 841(a)(1), and also was punished only once for her failure to appear for sentencing in violation of 18 U.S.C. § 3146." *Id.*

In *United States v Garcia*, 919 F.2d 881 (3d Cir.1990), the defendant had been arrested three times for drug-related offenses and used different names and addresses in each instance. The Government initially learned of only the second and

third arrests, so it only indicted the defendant for those activities. After the defendant pleaded guilty, but before sentencing, the Government learned of the other arrest and apprised the sentencing court of it. The extent to which the court relied on this information was unclear, but the defendant was sentenced at the upper end of the Guidelines range. The defendant was then indicted for the drug activities that had led to that other arrest. The defendant's motion for dismissal of those charges on double jeopardy grounds was granted, but the Third Circuit reversed, explaining:

> If we were to hold that the defendant in such a case has presented a *prima facie* case of a double jeopardy violation, such a *prima facie* case would exist in all situations where the presentence report in the first prosecution makes any reference to the unadjudicated criminal conduct. We believe considerable mischief would result if in every such case, the government had the burden of ruling out any possibility of a use that

implicates double jeopardy values.

Id. at 887.

In *Sekou v Blackburn*, 796 F.2d 108 (5th Cir.1986), the defendant argued that he was punished twice for the same offense when he was sentenced for felony-murder after the murder had been considered as an aggravating circumstance in his earlier sentencing for armed robbery. The Fifth Circuit rejected the argument:

> We hold that consideration of other crimes at sentencing does not implicate the Double Jeopardy Clause because the defendant is not actually being punished for the crimes so considered. Rather, the other crimes aggravate his guilty of, and justify heavier punishment for, the specific crime for which defendant has just been convicted.

Id. at 112. Thus, four other circuits that have address this issue have agreed that consideration of uncharged criminal activity in a prior sentence proceeding does not bar subsequent prosecution and punishment of that activity.

The district court expressed concern that Nyhuis's Michigan plea agreement was revised after his cocaine involvement came to light. The Government contends that this revision was based on the fact that Nyhuis had lied to the Government and to a grand jury about his involvement with Marian and in the cocaine business. There is a conflict in the evidence about exactly why Nyhuis's plea agreement was renegotiated to his detriment, but that factual issue is irrelevant to our decision. The Government does not dispute that the Michigan district court considered Nyhuis's cocaine activities in sentencing him on the CCE conviction, and it is the district court that set his punishment. Even if Nyhuis's Michigan sentence was enhanced because of his Florida cocaine activities, the punishment he received for those same activities in this case did not violate double jeopardy principles.

We join the Third, Fifth, Sixth, and Seventh Circuits in holding that the Double Jeopardy Clause does not bar prosecution and punishment for criminal conduct that has already been considered and used as the basis for a sentence enhancement in an earlier prosecution. The district court's denial of Nyhuis's motion to dismiss on double jeopardy grounds was proper.

II. NYHUIS'S IMMUNITY CLAIM

[4] Nyhuis claims that "the majority of the information used to indict [him in this Florida case] was obtained directly or indirectly as a result of [his] own original immunized testimony in Michigan." Nyhuis further states, "[o]bviously, all parties to the plea agreement were working under the impression that [Nyhuis] would receive immunity in Florida for his testimony and cooperation with the Government in their investigation of George Marian and his cocaine transactions."

Nyhuis argued before the district court and again on appeal that this Florida prosecution violates the protections afforded to him under the Supreme Court's decision in *Kastigar v United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). In response to Nyhuis's *Kastigar* challenge, and after several evidentiary hearings in connection with his motions to dismiss, the district court held:

> Because the indictment in the federal court in Florida was the result of an investigation conducted by Agent Waller through sources independent of Defendant Nyhuis's proffer, Grand Jury testimony, and the information given the authorities in the Western District of Michigan, use immunity will not bar the prosecution of Nyhuis in the Florid Court, *U.S. v Harvey*, 869 F.2d 1439 (11th Cir.1989). While Defendant was granted transactional immunity in the Western District of Michigan, such transactional immunity will not bar his prosecution pursuant to the Florida indictment. *United States v Brady*, [87-5578] (11th Cir. April 7, 1988).
>
> The Defendant having raised no issue that the Plea Agreement is ambiguous, the Motion to Dismiss the

> indictment of Defendant Nyhuis on grounds of immunity is denied.

In *Kastigar*, the Supreme Court reaffirmed the principles underlying the proscription against the use of immunized testimony:

> While a grant of immunity must afford protection commensurate with that afforded by the [Fifth Amendment] privilege [against self-incrimination], it need not be broader.... The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to ... criminal acts.'" Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

Kastigar, 406 U.S. at 453, 92 S.Ct. at 1661 (footnote with citations omitted). This Court thoroughly reviewed the topic of immunity grants in *United States v Harvey*,

869 F.2d 1439 (11th Cir.1989). As was stated in *Harvey*, "[d]ue process requires the government to adhere to the terms of any plea bargain or immunity agreement it makes." *Id.* at 1443. "[W]e apply the same rules and method of analysis to an informal grant of use or transactional immunity as we would to a formal grant." *Id.* at 1444 (footnote omitted). The distinctions between use and transactional immunity were carefully drawn in *Harvey*:

> Use immunity prohibits the use of compelled testimony, or any evidence derived directly or indirectly from that testimony, against the witness in a criminal prosecution. *See generally Kastigar v United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). In contrast to transactional immunity, use immunity does not prohibit the government from prosecuting the witness for crimes about which he testified, provided the government proves that it has other evidence to support the prosecution that "is derived from a legitimate source wholly independent of the compelled testimony." *Id.*, 406 U.S. at 460, 92 S.Ct. at 1665....
>
> ....

> Transactional immunity "accords full immunity from prosecution for the offense to which the compelled testimony relates." *Kastigar v United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 1661, 32 L.Ed.2d 212 (1972). The purpose of a grant of transactional (or use) immunity is to preclude a witness's reliance on his fifth amendment privilege against compelled self-incrimination: the government may compel a witness to testify by granting him immunity, provided that the scope of the immunity is at least as great as that of the fifth amendment privilege that the witness must forego. *Kastigar v United States*, 406 U.S. at 449, 92 S.Ct. at 1659.... As such, in deciding the scope of a grant of immunity the Supreme Court traditionally has referred to the scope of the fifth amendment privilege itself.

Id. at 1444-45 (footnote and citation omitted). Our review of a *Kastigar* claim is a deferential one and "we must affirm the district court's *Kastigar* decision unless it is clearly erroneous." *United States v Dynalectric Co.*, 859 F.2d 1559, 1578 (11th Cir.1988), *cert. denied*, 490 U.S. 1006, 109 S.Ct. 1641, 104 L.Ed.2d 157 (1989).

The district court concluded extensive *Kastigar* proceedings in this case. The Government's witnesses included assistant U.S. attorneys and DEA agents involved in the Michigan and Florida investigations and prosecutions. Assistant U.S. Attorney Courtade, who prosecuted Nyhuis in Michigan, testified that "it was our understanding and intent not to grant immunity in other districts [than the Western District of Michigan], for the reason that we believe that Mr. Nyhuis would be more cooperative if under the threat of other prosecutions." DEA Agent Douglas Waller, the Florida case against who presented the indictment to the Florida grand jury, testified that before the date of the first Florida indictment in which Nyhuis was named, he had never seen any Michigan DEA reports from Nyhuis's debriefing, nor any of Nyhuis's grand jury testimony, nor any other information

furnished by Nyhuis. Agent Waller also testified as to the "independent" source of information who implicated Nyhuis in the Florida conspiracy. Finally, Agent Waller stated that he was aware of the "potential problems" under *Kastigar* in using testimony of cooperating witnesses and had been advised to "use extreme caution" in this area. The district court found this testimony persuasive and so do we.

The district court also found that Nyhuis "raised no issue that the Plea Agreement is ambiguous." Nyhuis has apparently changed his mind and now argues that the agreement is ambiguous. We cannot agree. This Court has recently articulated principles that should be employed in interpreting plea agreements:

> Plea agreements are interpreted and applied in a manner that is sometimes likened to contractual interpretation. This analogy, however, should not be taken too far.... First, ... a "hyper-technical reading of the written

> agreement" and "a rigidly literal approach in the construction of language" should not be accepted. Second, the written agreement should be viewed "against the background of the"negotiations" and should not be interpreted to "directly contradic[t an] oral understanding." Finally, a plea agreement that is ambiguous "must be read against the government." The rationale for this method of interpretation is that a plea agreement must be construed in light of the fact that it constitutes a waiver of "substantial constitutional rights" requiring that the defendant be adequately warned of the consequences of the plea.

United States v Jefferies, 908 F.2d 1520, 1523 (11th Cir.1990) (citations omitted). We find no ambiguity in the relevant provision of the plea agreement. The Government "agree[d] not to bring additional criminal charges against the defendant in the Western District of Michigan arising out of his involvement in the distribution of marijuana." It has not done so. The Government further agreed not to bring additional charges against Nyhuis arising out of "those transactions

disclosed by the defendant in the proffer *already* made to the government." (Emphasis added.) It has not done so. At the time the plea agreement was executed, Nyhuis's proffer to the Government did not include any mention of his involvement with George Marian or in the cocaine trade. Indeed, the day after he executed the agreement, Nyhuis denied such involvement in his testimony before the Michigan grady jury. The Government has offered the credible and uncontradicted testimony of Agent Waller that it subsequently developed independent information concerning Nyhuis's involvement in Marian's cocaine conspiracy. To permit Nyhuis retroactively to sweep his cocaine involvement within the ambit of the plea agreement would be an endorsement of the strategy of telling a little and hiding a lot. A defendant may not stretch an agreement beyond its terms in order to escape prosecution on deliberately

concealed conduct. Disingenuous behavior, like narcotics trafficking, comes with a price.

Nyhuis also points to his own subjective belief that he was given global immunity, and his conclusory statement that the "standardized language" in the plea agreement did not accurately reflect the agreement of the parties. Neither of these contentions is persuasive. Based on this record, we conclude that the district court's denial of Nyhuis's *Kastigar*-based motion to dismiss was not clearly erroneous.

III. GOODMAN'S "ORGANIZER OR LEADER" SENTENCING CLAIM

At Goodman's sentencing, the district court overruled her objection to the Presentence Report's recommendation of a four-level increase in the base offense level because of Goodman's role as an "organizer or leader of a criminal activity

that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). The "organizer or leader" finding resulted in a four-level enhancement to Goodman's base offense level. Based on an adjusted level of 40 and a criminal history category of I, the court sentenced her to a 312-month term of imprisonment.

A. THE FACTS

In May and June of 1988, Goodman and her husband, Ricky Goodman, who were indicted along with Marian, Nyhuis, and others, collaborated with Marian on a scheme to import a 1,500 kilogram load of cocaine into the United States. According to witnesses at her trial, Goodman and her husband were "partners" in the narcotics trafficking trade. However, the aiding and abetting charge against Mrs. Goodman relates solely to the 1,500 kilogram load.

The idea for this load originated as a

result of some trouble that Ricky Goodman was having with his Colombian sources of supply. George Marian testified at Mrs. Goodman's trial that he had heard "through the grapevine" that Ricky Goodman had been smuggling marijuana for a group of Colombians and that part of a shipment had been lost. As a result, the Colombians kidnapped Ricky Goodman. Although he was later released, Ricky Goodman needed to do a drug shipment to "work off" his debt to the Colombians. George Marian agreed to help Ricky Goodman with a load of drugs to pay Goodman's debt; however, Marian also informed the DEA of the plan. According to Marian, he and Ricky Goodman discussed the plan with a representative of the Colombian cocaine source at Marian's house. Marian's girlfriend, Donna Lemons, and Mrs. Goodman were also present in the house but did not participate in the discussions.

On the night of the transactions,

Marian, Ricky Goodman and three boat drivers met a freighter that was carrying the cocaine. After the 1,500 kilograms were offloaded, approximately ninety-eight kilograms disappeared. Marian testified that shortly after the shipment, while Marian was staying at the Goodman's home in Miami, Mrs. Goodman mentioned to him that some "pieces [of the shipment] were missing" and that she was concerned about her husband's welfare because of the missing cocaine. But Marian also stated that he did not believe that Mrs. Goodman "had any knowledge of what was going on."

At Goodman's trial, Marian's girlfriend, Lemons, testified that Goodman told her that she knew the Colombians very well and that they had bought her jewelry. Lemons also claimed to have overheard Marian, Ricky Goodman, and Mrs. Goodman discuss smuggling ventures. According to Lemons, Mrs. Goodman had stressed to her how

important the 1,500 kilogram load of cocaine was because of Ricky Goodman's debt to the Colombians, and Mrs. Goodman also had said that the Goodmans needed to make money because she was pregnant. An associate of Ricky Goodman, Stephen Pisacano, testified that Mrs. Goodman "spearheaded" the effort to get Ricky Goodman released from the Colombians, and that she participated with her husband in soliciting from Pisacano a $50,000 investment in the 1,500 kilogram cocaine venture.

Goodman now offers two arguments in support of her claim that the district court erred in adopting this recommendation. First, Goodman contends that because she was charged only as an aider or abettor of the offense, she cannot be punished for having played a leading role in it. Second, Goodman argues that § 3B1.1 requires the court to focus on "the

defendant's role in the offense," and not on any other alleged criminal conduct. According to Goodman, the court erred in improperly considering evidence of Goodman's involvement in criminal activity other than the offense of conviction.

B. THE *JONES* RULE REQUIRING PRESENTATION OF ISSUES TO SENTENCING COURTS

The well-established rule in this Circuit is that "[w]here the district court has offered the opportunity to object and a party is silent or fails to state the grounds for objection, objections to the sentence will be waived for purposes of appeal." *United States v Jones*, 899 F.2d 1097, 1103 (11th Cir.), *cert. denied*, 498 U.S. 906, 111 S.Ct. 275, 112 L.Ed.2d 230 (1990), *overruled on other grounds by United States v Morrill*, 984 F.2d 1136 (11th Cir.1993) (en banc).

In the context of evidentiary objections, we have rejected attempts to

introduce new arguments on appeal:

> To preserve an issue at trial for later consideration by an appellate court, one must raise an objection that is sufficient to apprise the trial court and the opposing party of the particular grounds upon which appellate relief will later be sought. A general objection *or an objection on other grounds will not suffice.*

United States v Dennis, 786 F.2d 1029, 1042 (11th Cir.1986) (holding that objections to testimony on hearsay and relevance grounds were insufficient to preserve a claim that the district court erred in allowing a grand juror to testify before the jury regarding the materiality of an allegedly false declaration) (emphasis added), *cert. denied*, 481 U.S. 1037, 107 S.Ct. 1973, 95 L.Ed.2d 814 (1987); *see also United States v Williford*, 764 F.2d 1493, 1502 (11th Cir.1985) (where counsel argued that admission of sentencing transcript from another case constituted bolstering of a witness's credibility, but made only "vague

reference[s] to a concern about the inability to cross-examine the agents," such "statements were not sufficiently specific to apprise the trial judge of a hearsay objection"). The interests to be protected by the contemporaneous objection rule are no less important in the context of the sentencing process. Under the *Jones* rule, defendants have ample opportunity to articulate to sentencing courts their objections to presentence reports and to the court's sentencing decisions.

C. GOODMAN'S ARGUMENT THAT AN AIDER AND ABETTOR CANNOT BE SENTENCED AS AN ORGANIZER OR LEADER

[5] The question of whether Goodman waived her argument that an aider and abettor cannot receive an enhancement as an "organizer or leader" is a close one. However, we need not decide the waiver question because we find Goodman's contention to be without merit. *See, e.g., Smith v Dugger*, 840 F.2d 787, 791 (11th

Cir.1988) (declining to decide a procedural default issue because after considering "the merits it [was] apparent there [was] no substance to the constitutional claim"), *cert. denied*, 494 U.S. 1047, 110 S.Ct. 1511, 108 L.Ed.2d 647 (1990).

Goodman concedes that a person convicted of aiding or abetting "is punishable as a principal." 18 U.S.C. § 2(a); *see also* U.S.S.G. § 2X2.1. The commentary to § 2X2.1 explains that "[t]his section provides that aiding and abetting the commission of an offense has the same offense level as the underlying offense." U.S.S.G. § 2X2.1, comment. (backg'd.). Goodman cites no authority, and we have found none, which holds that "aiding and abetting" and "organiz[ing] or lead[ing]" are mutually exclusive when it comes to sentencing.

The rule advocated by Goodman would mean that a defendant who is indicted as an

aider and abettor and whose full level of involvement in a crime only comes to light during trial cannot receive the measure of punishment commensurate with her level of participation. That would not be good. Moreover, such a rule would be inconsistent with our decisions permitting unindicted conduct to serve as a basis for sentence enhancements. *See, e.g., United States v Ignancio Munio*, 909 F.2d 436, 438-39 (11th Cir.1990) (holding that, although the indictment did not charge an amount of counterfeit currency greater than $10,840, court could consider the evidence of defendant's connection with $1.1 million in counterfeit currency), *cert. denied*, 499 U.S. 938, 111 S.Ct. 1393, 113 L.Ed.2d 449 (1991). The rule Goodman advocates would also be inconsistent with our rule that "'an acquittal does not bar a sentencing court from considering the acquitted conduct in imposing sentence,' if the

conduct is established by reliable evidence." *United States v Lynch*, 934 F.2d 1226, 1234 n.8 (11th Cir.1991) (quoting *United States v Rivera-Lopez*, 928 F.2d 372, 373 (11th Cir.1991) (per curiam)), *cert. denied*, ___ U.S. ___, 112 S.Ct. 885, 116 L.Ed.2d 788 (1992). Because evidence of unindicted conduct and of conduct for which the defendant has been acquitted can be considered in sentencing, it follows that evidence that goes beyond an averment of the indictment can be considered as well. If the Government establishes by a preponderance of the evidence that a defendant convicted as an aider and abettor was, in fact, an organizer or leader of the offense conduct, that is sufficient under § 3B1.1.

D. GOODMAN'S ARGUMENT THAT THE DISTRICT COURT RELIED IMPROPERLY ON EVIDENCE OF GOODMAN'S OTHER CRIMINAL CONDUCT IN SENTENCING HER AS AN ORGANIZER OR LEADER UNDER U.S.S.G. §3B1.1

While Goodman's first contention

presented a close waiver question, her second one does not. Goodman did object to the Presentence Report's recommendation of a four-level increase on the grounds that such an increase was not supported by the evidence adduced at trial. Goodman failed to suggest to the district court, however, that it had improperly considered evidence of Goodman's other criminal activity. Therefore, our review of Goodman's contention is limited to determining whether the district court committed plain error. *See United States v Neely*, 979 F.2d 1522, 1523 (11th Cir.1992) ("We will only consider objections raised for the first time on appeal under the plain error doctrine to avoid 'manifest injustice.'"). We cannot say that it did. *See generally United States v Olano*, ___ U.S. ___, ___, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993) (examining the limitations on appellate authority under Fed.R.Crim.P.

52(b)).

The convictions and sentences of Nyhuis and Goodman are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-3628

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DOUGLAS NYHUIS,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONDSON and CARNES, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the

Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CASE NO. 90-139-CR-ORL-19

DOUGLAS NYHUIS,

Defendant.

ORDER

This case was considered by the Court at evidentiary hearing on Defendant's Motions to Dismiss on Grounds of Double Jeopardy and Immunity (Doc.No. 231 and 358, filed November 14, 1990 and December 3, 1990, respectively). Counsel for both parties and the Defendant, Douglas Nyhuis, were present at these proceedings. Upon consideration, the Court enters its Order as follows:

FINDINGS OF FACT

In December 1989, Defendant, Douglas Nyhuis, was named as a Defendant in two

Counts of an indictment filed in the United States District Court in and for the Western District of Michigan. He was charged in Count One of such indictment with conspiracy to distribute and possess with intent to distribute marijuana from on or about December 1983 through on or about October 1987. In Count Twenty-six he was charged with conducting a continuing criminal enterprise for the period of on or about January 1985 through on or about October of 1987. Count Twenty-six incorporated the conspiracy charged in Count One as a predicate act.

On November 9, 1989, after a series of negotiations, Defendant Nyhuis was debriefed by the Drug Enforcement Administration agent in the presence of Assistant United States Attorney Courtade who was responsible for prosecuting the charges contained in the indictment. During the course of this debriefing,

Nyhuis stated that George Marian was a high school friend of James Muth and that the only association of Nyhuis with Marian was when Marian rented a house to Patricia Miller. Nyhuis also explained his association with marijuana distribution and sales organization without mentioning the name of George Marian. The contents of this debriefing were reported in a DEA Form 6 by Agent Scott Herman (Government's Exhibit 6).

On December 13, 1989, Defendant Nyhuis executed a Plea Agreement under which he agreed to enter a plea of guilty to County Twenty-six of the pending indictment. This Plea Agreement by express provision was limited to the Western District of Michigan:

> [T]he government agrees not to bring additional criminal charges against the defendant in the Western District of Michigan arising out of his involvement in the distribution of marijuana and those transactions disclosed by the defendant in the

proffer already made to the government (Government's Exhibit 3).

Under the Plea Agreement, Nyhuis was given immunity in the Western District of Michigan for information given during his proffer on November 9, 1989. The information supplied during the proffer involved solely marijuana transactions, did not involve cocaine, and made reference to George Marian only as noted earlier in this Order.

On December 14, 1989, Nyhuis testified before the Grand Jury in the Western District of Michigan (Government's Exhibit 4). During the course of this testimony, Defendant again denied any involvement with George Marian except with reference to the rental by Marian of a house to Patricia Miller (Transcript pages 47 to 48). This statement was not true. Further, in response to questions asked during the proceedings, the Defendant Nyhuis spoke

only of marijuana transactions and did not reveal any transactions involving cocaine.

In the interim, Mr. Herman and Mr. Courtade learned from sources other than Defendant Nyhuis that Nyhuis had been involved with cocaine and, in particular, that he had been involved in the sale and distribution of cocaine with George Marian. This information came from debriefings of Mr. Mark DeVries, James Muth, Jim and Kathy Dabbous and Jeff Weimer. Some of these witnesses were named in the Government's Bill of Particulars filed on March 27, 1990 (Defendant's Exhibit 10).

Thereafter, Herman and Courtade advised Nyhuis and his attorney that in their opinion he had been lying to them, and Defendant admitted his involvement in cocaine trafficking with George Marian at a debriefing held April 6, 1990. Both Courtade and Herman testified that Defendant gave a variety of reasons why he

withheld from them the information on cocaine and Marian, but the primary reason he gave was that he felt it would be a lever to further reduce his sentence and that the cocaine transactions were a "separate" deal from the marijuana transactions. A summary of the April 6, 1990 debriefing is contained in Herman's DEA Form 6 (Government's Exhibit 10).

On May 25, the Defendant with his counsel and the Assistant United States Attorney stipulated to amend the Plea Agreement, changing paragraph 4(a), which provided for a recommended sentence of ten (10) years, to a provision that the sentence imposed upon the Defendant would not exceed fifteen (15) years (Government's Exhibit 7). The Government explained in a sentencing memorandum dated May 24, 1990, that the increased exposure contained in this amendment to the Plea Agreement was due to the Defendant's failure to cooperate

(Defendant's Exhibit 2).

Thereafter, Defendant Nyhuis testified at the trial of his co-conspirators pursuant to the pending indictment in the Western District of Michigan, such testimony being given on June 5, 6 and 7, 1990. On a Motion in Limine, the Court excluded any reference to cocaine during the course of this trial. The trial resulted in convictions after the Government proved that George Marian was involved in marijuana trafficking which began before 1983 and which involved Nyhuis.

The sentencing of Defendant Nyhuis was held on July 16, 1990 in the Michigan federal court before the Honorable Judge Richard A. Enslen. The Government's Sentencing Memorandum filed May 24, 1990 (Defendant's Exhibit 2) contains reference to the Defendant's involvement with cocaine trafficking. Mr. Courtade also testified

that at sentencing the Judge considered Mr. Nyhuis' involvement with cocaine (see Doc. No. 587, pp. 7-9, 26, & 29). The transcript of the sentencing proceeding (Doc. No. 587) confirmed that Judge Enslen considered Mr. Nyhuis' involvement with cocaine.

Contrary to evidence presented to this Court which indicated that any increase in the stipulated sentence included in Nyhuis' amended plea agreement (Government's Exhibit 7) was a result of Nyhuis' failure to cooperate and his concealment of information from the Michigan authorities (see Defendant's Exhibit 2), the transcript of the sentencing proceeding held in Michigan on July 16, 1990, reveals that Mr. Courtade told the Michigan Court that the reason the Plea Agreement with Mr. Nyhuis had been amended was to increase the agreed upon minimum sentence from ten years to fifteen years of imprisonment to include

Mr. Nyhuis' involvement with cocaine trafficking:

> [the] agreement was 15 years, which we believe would have been covered by the involvement with cocaine, if we divorced all of the marijuana from the case, or it would have been an agreement that should he have lied -- and I stress to the Court that he did not lie to the grand jury about his involvement in cocaine; there was no lying that took place. Should he have, we believe that that would have warranted five years in and of itself.
>
> So we agreed, we -- it was part of our negotiation strategy -- and we arranged that his sentence reflect not only his involvement with cocaine, but should he have been asked those questions, it was an understanding that he could have faced five more years, and you would have given him five more years, or at least five.
>
> So it was kind of a com-, of the adding of the potential criminality should he have lied -- which he did not do -- and his involvement with cocaine divorced from the marijuana, we just figured they were both worth five years, and this is what we thought (Doc. No. 587 pp. 8 & 9).[1]

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[1] This Court notes that contrary to the representation by Mr. Courtade to the Michigan Court in the sentencing proceeding

This information provided to Judge Enslen at the time of sentencing and Judge Enslen's comments at sentencing indicate that the July 16, 1990, sentence included a separate punishment for Mr. Nyhuis' cocaine involvement.[2]

Defendant thereafter testified as a witness in another Grand Jury proceeding held July 18, 1990 in Grand Rapids, Michigan (Court's Exhibit 1, partially under seal). Following this testimony, on application of Defendant to reduce his sentence, the Government filed a response on November 29, 1990 in which the

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noted above, Mr. Courtade testified in this Court that Mr. Nyhuis had in fact lied to the Grand Jury which fact was known to the Govern at the time of the July 16, 1990, sentencing proceeding. See also discussion at page 3 above.

[2] Regarding Mr. Nyhuis' cocaine involvement Judge Enslen made the following remarks: "He [Dennis Erickson] had, as did Mr. Nyhuis, a past history in dealing with cocaine (Doc. No. 587, p. 26)," and "Somebody sells cocaine as he [Mr. Nyhuis] did. Somebody dies (Doc. No. 587, p. 29)."

Government argued that it had not negotiated non-prosecution agreements with other federal districts in order to get Defendant's cooperation and to increase his value as a witness in other districts which might wish to consider granting him immunity even though his cooperation had been suspect.

Meanwhile, in Florida, DEA Task Force Agent Douglas Scott Waller had begun investigating George Marian and his cocaine trafficking business in November of 1989.[3] The development of information on the cocaine transactions of George Marian by the DEA Agents in the Middle District of Florida was separate and independent from any information that had been provided by Douglas Nyhuis to the agents or the Assistant United States Attorney in the

[3] The investigation of Marian had begun in November of 1988 in Florida before Agent Waller began his work with the Drug Enforcement Administration.

Western District of Michigan. Agent Waller testified that although he had gone to the Western District of Michigan to debrief witness Muth, DeVries, and Mr. and Mrs. Dabbous on March 21, 1990, he did not see the DEA 6 forms prepared with references to the Nyhuis debriefings, he had not heard of or reviewed the Grand Jury testimony of Mr. Nyhuis, and he did not discuss with anyone any information given by Nyhuis.[4] Mr. Waller described in detail the witnesses whom he identified, the dates they were debriefed, and the information that they

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[4] Agent Waller testified that at the time he began the investigation and again in January of 1990 when Mr. Marian began cooperating with the Government, he was advised of the problems identified in Kastigar v. United States, 406 U.S. 441 (1972), and in particular he was aware that he should not take any documents or information concerning Marian from any other agency on cooperating witnesses. Waller testified that he did not take documents or information concerning this investigation from other agencies, except for a statement which he received early in the investigation from a witness in California named George Shelky.

gave him concerning Defendant Nyhuis. Pursuant to this investigation, Defendant Nyhuis, George Marian and others were named as Defendants in an indictment filed in October of 1990 in the United States District Court for the Middle District of Florida. Defendant Nyhuis is charged in Count Two of this indictment with conspiracy to possess with intent to distribute cocaine from about March, 1985 until at least October, 1989.[5]

During the course of the evidentiary

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[5] Defendant Nyhuis is charged in Count Two of the indictment with conspiracy to possess with intent to distribute cocaine from about March, 1985 until at least October, 1989. On November 29, 1990, the first superseding indictment was filed, and on December 12, 1990, the second superseding indictment was filed in this case. Agent Waller testified that as to all three indictments he did not receive information from anyone concerning Mr. Nyhuis and his cooperation except from witnesses who had participated in the narcotics trafficking business whom he independently identified and debriefed during the course of his investigation centered in Florida.

hearing held before this Court, Mr. Courtade testified that his office viewed the marijuana conspiracy and the cocaine conspiracy as two separate conspiracies, not only because the drugs which were the subject of the conspiracies were different but also because: (1) the supply lines did not have the same "overlap" of participants, (2) the Defendant was not involved in the marijuana business from 1987 through 1989, (3) George Marian had switched from the sale of marijuana to the sale of cocaine in 1985, and (4) the Government did not know of the cocaine conspiracy until after Douglas Nyhuis entered his Plea Agreement which was limited to the marijuana conspiracy.[6]

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[6] From the evidence presented at the evidentiary hearing before this Court, not only from agent Waller explaining the course of his investigation but also from various participants in the cocaine and marijuana importation and distribution organization, it appears that in 1985 Marian changed his business operation to

CONCLUSIONS OF LAW

Because the indictment in the federal court in Florida was the result of an investigation conducted by Agent Waller through sources independent of Defendant Nyhuis' proffer, Grand Jury testimony, and the information given the authorities in the Western District of Michigan, use immunity will not bar the prosecution of Nyhuis in the Florida Court, U.S. v Harvey, 869 F.2d 1439 (11th Cir. 1989). While Defendant was granted transactional immunity in the Western District of Michigan, such transactional immunity will

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cocaine importation and abandoned his marijuana distribution business. Other people moved into the vacuum this created and continued the marijuana distribution network which had been established by Marian. However, a determination that the conspiracy involving cocaine charged in the Florida indictment is a separate conspiracy from the continuing criminal enterprise involving marijuana in the Michigan indictment is not necessary to the Court's decision on the Defendant's pending motions.

not bar this prosecution pursuant to the Florida indictment. United States v Brady, Case No. 97-5578 (11th Cir. April 7, 1988).

The Defendant having raised no issue that the Plea Agreement is ambiguous, the Motion to Dismiss the indictment against Defendant Nyhuis on grounds of immunity is denied.

Defendant argues that the prosecution against him in Florida is barred by the principle of double jeopardy because the cocaine conspiracy charged in the Florida indictment and the marijuana conspiracy charged in the Michigan indictment involved the same conspiracy and further that the cocaine trafficking alleged in the Florida indictment was an underlying overt act to the continuing criminal enterprise charged and to which he entered a plea of guilty in

the Michigan federal court.[7]

The Double Jeopardy Clause of the Fifth Amendment protects individuals against a second prosecution for the same offense after either acquittal or conviction. U.S. Cont. Amend. V; Albernaz v. United States, 450 U.S. 333 (1981). Defendant Nyhuis claims that the prior continuing criminal enterprise conviction in Michigan and the conspiracy charged in the Florida indictment are aspects of the same continuing violation of law and that the conspiracy charged in the Florida indictment merges with the continuing criminal enterprise charged in Michigan to

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[7] The Court notes initially that from the evidence Defendant himself treated these conspiracies as separate in that he revealed his involvement in the marijuana transaction, and while falsely stating that he had no involvement with George Marian either in marijuana or cocaine trafficking, Defendant failed to reveal his involvement with cocaine trafficking until he was caught in his non-disclosure by the authorities in Michigan.

which he plead guilty. In United States v. Chagra, 653 F.2d 26 (1st Cir. 1981), cert. denied 455 U.S. 907 (1982), the First Circuit held that conviction on a continuing criminal enterprise charge does not bar, on double jeopardy grounds, subsequent prosecution for conspiracy, importation and possession which were allegedly committed and which might have been, but were not used to prove the continuing criminal enterprise violation. The Court in Chagra noted that no evidence about the subsequently charged offense was introduced in the original proceeding and further that neither the judge nor the jury in the initial proceeding could have used the subsequent activity as a basis for assessing punishment. The First Circuit reasoned that Congress had intended the continuing criminal enterprise violation to be harsh, "providing particularly severe punishments for multiple offenders," and

that enforcement would be hampered if no further prosecutions could be brought for any of the drug offenses committed during the enterprise period charged. Chagra 653 at 31-32.[8]

There was no allegation of or proof of any cocaine transactions with reference to the indictment filed or the trial on such indictment in the federal court in the Western District of Michigan. The indictment pending in the Florida federal court alleges only conspiracy to possess with intent to distribute cocaine in Count Two. Under the law if a conspiracy could have been proven but was not proven as part of an indictment charging a continuing criminal enterprise, double jeopardy will

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[8] The Fifth Circuit has adopted the rule enunciated by the First Circuit in Chagra stating that: "the deterrent effect of the statute would be weakened if the government could not prosecute underlying offenses not relied upon." United States v. Oberski, 734 F.2d 1030 (5th Cir. 1984).

not act as a bar to a later prosecution for the conspiracy. See Chagra supra and Oberski, 734 F.2d 1030 (5th Cir. 1984).

However, Defendant Nyhuis's involvement in the sale and distribution of cocaine was considered by Judge Enslen when sentencing Nyhuis on the continuing criminal enterprise count in the Michigan Court (See Defendant's Exhibit 2). "[C]onsideration of a prior bad act at sentencing will not ordinarily create a double jeopardy bar to a later prosecution for that bad act." United States v. Garcia, 919 F.2d 881, 885 (3rd Cir. 1990); see also Sekou v. Blackburn, 796 F.2d 108 (5th Cir. 1986); United States v. Wise, 603 F.2d 1101 (4th Cir. 1979); United States v. Troxel, 887 F.2d 830 (7th Cir. 1989). "Mere mention of a bad act in Sentencing for a crime does not amount to attachment of jeopardy for that act." Troxel, 887 at 836. Additionally, a sentencing judge may use

"other bad acts . . . to evaluate the character of the defendant and the character of the crime for which he was convicted." Garcia, 919 F.2d at 886.

The Court finds that prosecution of Defendant Nyhuis pursuant to the indictment in the Florida federal court would not be barred by double jeopardy on the basis of multiple prosecution. However, a far more difficult issue under the law is raised by Defendant Nyhuis' claim that he is subject to multiple punishment in violation of the double jeopardy clause because his sentence for the marijuana conviction in the Western District of Michigan included a separate punishment for his cocaine involvement. It appears from the record presently before this Court that Defendant Nyhuis' Michigan Plea Agreement was renegotiated to include an additional five years of imprisonment for his cocaine trafficking, that Judge Enslen considered Defendant Nyhuis' cocaine

trafficking in fashioning a sentence for Defendant Nyhuis, and that Defendant Nyhuis received punishment from the Court in the Western District of Michigan for his cocaine trafficking which is also the subject of the present Florida indictment.

While the Eleventh Circuit has not yet ruled on this issue the Tenth Circuit has held that it would be consistent with double jeopardy to permit a defendant to be prosecuted for a crime even though evidence concerning the defendant's commission of that crime had already been used to enhance the defendant's sentence for an earlier offense. United States v. Koonce, 885 F.2d 720 (10th Cir. 1989). "Unless and until defendant receives some punishment from the district court that is arguably multiple, the issue is not ripe for review." Koonce, 885 F.2d at 722. Therefore, following the logic of the Tenth Circuit, the Court determines that the issue of multiple

punishments is not yet ripe for review and declines to dismiss the indictment against Defendant Nyhuis.[9]

Upon consideration and for the reasons stated above, Defendant Nyhuis' Motions to Dismiss the Indictment on grounds of Double Jeopardy and Immunity (Doc. Nos. 231 and 358, filed November 14, 1990 and December 3, 1990, respectively) are DENIED.

DONE AND ORDERED at Orlando, Florida, this 4th day of April, 1991.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record

[9] Although adhering to the logic of the Tenth Circuit's double jeopardy argument, the Court notes that the result of trying a defendant only to have his sentence discarded on double jeopardy grounds will result in a waste of both the Court's time and the taxpayers' money.

UNITED STATES OF AMERICA

IN THE U.S. DISTRICT COURT FOR THE

WESTERN DISTRICT OF MICHIGAN,
SOUTH DIVISION

- - - - - - - -

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DOUGLAS NYHUIS,

Defendant.
_____/

No. G89-178-01 CR

Hon.

PLEA AGREEMENT

The United States of America, by and through John A. Smietanka, United States Attorney for the Western District of Michigan, and Mark V. Courtade, Assistant United States Attorney, and the defendant, Douglas Nyhuis and his attorney, James M. Catchick, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, have entered into an agreement resolving this matter by a plea of guilty under the following terms and conditions:

1. In the Western District of Michigan, the defendant, Douglas Nyhuis, agrees to plead guilty to that count of an indictment charging him with engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848 prior to 1988. The defendant realizes this offense is punishable by a mandatory prison term of ten years, a maximum potential penalty of life imprisonment and a fine of $2,000,000. The defendant realizes that a $50.00 special assessment will also be assessed upon a plea to this charge. The defendant further understands that a sentence under this section is not probationable and may not be suspended.

2. The defendant agrees to fully cooperate with the Drug Enforcement Administration, the United States Attorney's Office and any other law enforcement agency in the investigation of past crimes over which they have actual or

apparent jurisdiction. This cooperation consists of all steps needed to uncover and prosecute such crimes including but not limited to: truthfully answering investigators' questions, meeting with prosecutors before testifying, truthfully testifying before grand juries and at trial and providing relevant objects, documents and photographs in the defendant's possession or under his control. The defendant will submit to polygraph examination(s) upon request. The frequency and duration of such cooperation is at the government's discretion.

3. The defendant agrees to fully cooperate with the government in its seizure and forfeiture of assets under 21 U.S.C. § 853 which encompass among other things all proceeds of drug trafficking, assets purchased with such drug proceeds and assets used or intended to be used in furtherance of such trafficking.

Specifically, the defendant shall truthfully answer all inquiries by the government regarding such matters, testify truthfully as required, supply all available documentation, and assist in the location of any concealed assets. The government recognizes that persons other than the defendant are not bound by this agreement and may persist in claims, whether valid or not.

4. The United States Attorney's Office agrees:

> (a) To make a binding sentence recommendation that the sentence to be imposed by the court be one of ten years (the statutory minimum). This will be a binding recommendation pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C); and
>
> (b) The government agrees to make a non-binding recommendation that the sentence imposed by the court run concurrent with a sentence the defendant is currently serving in Michigan. If the court does recommend a concurrent term, the United States Attorney's Office for the Western District of Michigan will not oppose the defendant's

efforts to have the balance of his Michigan sentence served in federal custody. The United States Attorney's Office has made no promises or representations to the defendant concerning the likelihood of his success in arranging such a scenario and the defendant's success in such an endeavor shall not be material to this plea agreement.

(c) The government agrees not to bring additional criminal charges against the defendant in the Western District of Michigan arising out of his involvement in the distribution of marijuana and those transactions disclosed by the defendant in the proffer already made to the government.

(d) To dismiss Count I of the Information at the time of sentence.

5. The United States Attorney for the Western District of Michigan will forebear from charging other members of the defendant's, Douglas Nyhuis's, immediate family with offenses arising from the defendant's involvement in marijuana distribution and now known to the United States Attorney for the Western District of Michigan and currently under investigation.

6. Defendant Douglas Nyhuis

acknowledges that by such plea of guilty provided for herein, there will be no trial of any kind and that by such plea he waives his right to trial by jury or by the court, as well as his right against self-incrimination, his right to confront and cross-examine witnesses against him and to call witnesses to testify in his behalf.

7. Defendant Douglas Nyhuis acknowledges his plea of guilty is voluntary and knowingly made and is not the result of force or threats or promises apart from this plea agreement and that this plea agreement represents the entire agreement between the parties.

8. Should this plea agreement be rejected, withdrawn or breached all provisions herein shall be rendered null and void and the United States shall hereby be free to bring such additional charges as the law, facts and situations warrant.

Respectfully submitted,

JOHN A. SMIETANKA
United States Attorney

MARK V. COURTADE
Dated: 12-13-89 Assistant U.S. Attorney

DOUGLAS NYHUIS
Dated: 12-13-89 Defendant

JAMES CATCHICK
Dated: 12-13-89 Attorney for Defendant

UNITED STATES OF AMERICA

IN THE UNITED STATES COURTS FOR THE

WESTERN DISTRICT OF MICHIGAN,
SOUTH DIVISION

- - - - - - - - -

UNITED STATES OF AMERICA,

Plaintiff, No. G89-178 Cr.
Hon. Richard A. Enslen

vs.

DOUGLAS NYHUIS a/k/a DOUGLAS DEVRIES, JOHN CAMPAU, JAMES MUTH, CHARLES ANDREWS, DAVID VANHALSEMA, DAVID MANGLES, CINDY MANGLES, JAMES DABBOUS, KATHY DABBOUS, JOHN GALE, JEFF BAKKE, RICHARD RAU, FREDERICK DEVRIES, MARK DEVRIES, GARY VANHOOK, STEPHEN BROWN, DIRCK MORRIS, SERGE LISK, EARLE JAMES WATTERWORTH III, a/k/a JAMES WATTERWORTH, and PAM WATTERWORTH

Defendants.
_____/

STIPULATION TO AMEND PLEA AGREEMENT

The United States of America by and through its attorneys, John A. Smietanka, United States Attorney for the Western District of Michigan, and Mark V. Courtade, Assistant United States Attorney, and defendant Douglas Nyhuis and his attorney,

James Catchick, stipulate and agree that the Plea Agreement between the parties placed on the record on January 29, 1990, may be amended as follows:

(1) Paragraph 4(a) shall now state:

> "(a) To make a binding sentence recommendation that the sentence to be imposed by the court ~~be one of~~ not exceed fifteen (15) years. This will be a binding recommendation pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C); and"

In all other respects the Plea Agreement shall remain unchanged.

Respectfully submitted,

JOHN A. SMIETANKA
United States Attorney

MARK V. COURTADE
Dated: 5-25-90 Assistant U.S. Attorney

DOUGLAS NYHUIS
Dated: 5-25-90 Defendant

JAMES CATCHICK
Dated: 5-25-90 Attorney for Defendant

UNITED STATES OF AMERICA

IN THE UNITED STATES COURTS FOR THE

WESTERN DISTRICT OF MICHIGAN,
SOUTH DIVISION

- - - - - - - -

UNITED STATES OF AMERICA,

Plaintiff,

No. G89-178-01 CR

Hon. Richard A. Enslen

vs.

DOUGLAS NYHUIS,

Defendant.

_____/

GOVERNMENT'S SENTENCING MEMORANDUM

The government has earlier provided information to the probation officer concerning the prosecution's version of the facts as they exist in this case. Additionally, the government has submitted to the probation officer information concerning mistakes in the presentence investigation which were incorporated in a supplement to the presentence report dated March 16, 1990.

The government believes that the

following information should be either added to or deleted from the presentence report:

1. The presentence report should reflect the amendment of the plea agreement that calls for the government to make a recommend that the sentence to be imposed by the court not exceed 15 years incarceration.

2. The government believes that paragraph 21 on page 6 of the presentence report should be eliminated as those facts were not proven at trial nor substantiated by the witnesses at trial.

FURTHER DRUG INVOLVEMENT OF DOUGLAS NYHUIS

In debriefing other co-defendants pursuant to cooperation agreements the government developed a clearer picture of Nyhuis's cocaine and drug dealings during the past five years. From these co-defendants (as later confirmed by the defendant) the government has learned that Mr. Nyhuis served as a "middle-man" and arranged to secure kilo quantities of cocaine on a "special order" basis on

several occasions during the past few years. This information was not available to the probation agent at the time of the original presentence report was prepared as these other co-defendants had yet to be debriefed by the government. From these sources the government has learned the following:

During the fall of 1986 Douglas Nyhuis arranged to sell between four and seven kilograms of cocaine to co-defendant Fred Devries in Hollywood, Florida. The cocaine was secured from a co-conspirator that resided in Florida.

During the winter of 1987 Douglas Nyhuis made arrangements to receive one to two kilograms of cocaine from James Muth on a front basis for $18,000 per kilogram. Douglas Nyhuis in turn sold these kilograms of cocaine to Fred Devries for $24,000 each.

In February of 1988 Douglas Nyhuis

received an additional kilogram of cocaine from James Muth for $18,000 and sold it to Fred Devries for $22,000.

Douglas Nyhuis admitted receiving one additional kilogram in early 1988, but could not recall who he delivered it to.

In February of 1989 Douglas Nyhuis contacted a Grand Rapids resident not connected with the earlier conspiracy and sent him to Florida where a kilogram of cocaine was secured from the same Florida resident mentioned above (not Muth).

That same month, Douglas Nyhuis arranged for co-defendants John Gale and Mark Devries to purchase approximately 210 pounds of high quality marihuana and transport it to Michigan. Douglas Nyhuis was to receive between $50 and $100 per pound for the marihuana secured by Gale and Devries. John Gale delivered approximately 25 pounds to Pam and Jay Watterworth and received payment from them both.

Later, Mark Devries managed to purchase one to two kilograms of cocaine from this same Florida source used earlier (the source of marihuana and cocaine was the same). According to Mark Devries, Douglas Nyhuis knew of the first kilogram in advance and provided a Florida beeper number to facilitate the purchase of the second. According to Douglas Nyhuis he arranged the first purchase of a kilogram of cocaine by Mark Devries, but was unaware of the purchase of the second until after it occurred.

From the above information the government concludes that the defendant was responsible for the purchase and distribution of between six and nine kilograms of cocaine during calendar years 1986 through 1989. The defendant was also involved in arranging the purchase of approximately 125 pounds of high quality marihuana during the spring of 1989.

SPECIFIC GOVERNMENT RECOMMENDATION

During 1984, 1985 and 1986 Douglas Nyhuis headed up a marihuana distribution organization responsible for the distribution of at least nine tons of marihuana in the Kent County, Michigan, area. During 1987 he oversaw and funded the distribution of approximately 300 pounds of marihuana while incarcerated in the Kent County Jail. Since 1987, Mr. Nyhuis has been involved in the distribution of kilo quantities of cocaine and more than 100 pounds of high quality marihuana. In May of 1989, while awaiting sentence on a state marihuana delivery charge, Mr. Nyhuis was arrested in a reverse-sting operation and possessed approximately $105,000 in cash which was the proceeds of drug trafficking. During the course of the defendant's involvement with marihuana the government believes the defendant made at least $1,000,000 in

profit (based on a nominal $60/pound profit the defendant claims -- government information from other sources suggest the defendant profited by over $100 per pound). The government seized $105,000 and the defendant claims to have lost one load of marihuana valued at $160,000 while he was incarcerated and $180,000 during the Chiefland, Florida, arrest; assuming these facts as true over one-half millions dollars remains unaccounted for. The government has never been completely satisfied with the defendant's claim that he is now "broke."

It is the government's further position that Mr. Nyhuis has been involved in the distribution of controlled substances since the mid-1970's and there appears no great likelihood that he can be rehabilitated to the point where he will not consider distributing controlled substances in the future. The government recommends that the

court accept the plea agreement between the parties, however, as the United States Attorney's Office believes Mr. Nyhuis has complied with his promise to cooperate with the government in this investigation and others. Mr. Nyhuis' testimony was crucial to securing the conviction of six co-defendants at trial recently and his publicized willingness to cooperate with authorities was a motivating factor in securing thirteen other guilty pleas from co-defendants. The government believes that the sentencing range left to the court under the terms of the plea agreement (10 to 15 years incarceration) is sufficient to assure that this court can impose an appropriate sentence. The government further stresses that the court should recognize that the defendant will not be entitled to receive the same "credits" towards his sentence as would be normally available in a marihuana distribution case

as the defendant's charge of conviction is for engaging in a Continuing Criminal Enterprise. It is the government's understanding that, based upon the charge of conviction the defendant will be required to serve approximately two-thirds of the actual sentence the court imposes even should he earn the maximum amount of disciplinary credits and good time otherwise available to him. In this regard, a sentence of 15 years by this court is in all probability equivalent to a sentence of 25 or more years on a charge of conspiracy to distribute marihuana.

With the above statement in mind, the government asks the court to accept the plea agreement negotiated between the parties and impose a sentence of 15 years incarceration. The government further recommends that this sentence run concurrent with the sentence the defendant is currently serving in Michigan.

Respectfully submitted,

JOHN A. SMIETANKA
United States Attorney

Dated: 7-10-90

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